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OFFICE OF THE PUBLIC DEFENDER
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STATE OF DELAWARE

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

Cases Summarized and Compiled by
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DELAWARE SUPERIOR COURT CASES

STATE V. GIBSON (Sept. 9, 2008): INVOLUNTARY STATEMENT **DEFENSE MOTION GRANTED**

In a short letter following up on an oral ruling, the trial court granted D's motion to suppress his statement to police. While the facts were not detailed, the decision is noteworthy. The court found D's statement to be involuntary based on: D's mental retardation and cognitive limitations; D's lack of a high school degree; the fact that the officer told D he "had to tell her" what happened; the custodial setting; and D's lack of prior dealings with police. These circumstances demonstrated that D's statement "was "not the product of his 'free and rational choice.'" Thus, his statement was inadmissible even for impeachment purposes.

STATE V. BEZAREZ (Sept. 11, 2008): 5th AMENDMENT RIGHT TO COUNSEL **DEFENSE MOTION GRANTED**

During interrogation, D unambiguously invoked his right to counsel. P then said, "you get the point that I know something," then prompted D to clarify that he wanted counsel. D confirmed his invocation. This time P said, "you didn't give me anything so obviously you have something to hide." The court concluded that these statements were designed to elicit incriminating information. Thus, D's statements were suppressed under the Fifth Amendment right to counsel.

DELAWARE SUPREME COURT CASES

FLAMER V. STATE (July 1, 2008): 6th AMENDMENT/ *D.R.E.* 106

Co-D entered an agreement with the State which included testifying against D. At trial, the State played only 4 minutes of a phone call between D and Co-D where D

encouraged Co-D not to testify. On appeal, D cited no cases but argued his right to counsel was violated because Co-D was working for the State at the time of the call and D had no attorney. The Court ruled that Co-D was not a State agent at the time and, thus, there was no violation. D also argued his right to confrontation was violated because he could not cross-examine Co-D on the context of the entire conversation. The Court ruled that this issue was waived as it was not raised below and was not supported on appeal by any case law. However, in the interest of justice, it did consider the issue. The Court held that *D.R.E.* 106 codifies the common law "rule of completeness" and places the burden on the defense to seek the introduction of relevant parts of the record that explain the context of the conversation. Thus, in this case, there was no plain error.

WILKERSON V. STATE (July 8, 2008): RIGHT TO CROSS-EXAMINATION & CONFRONTATION/ *D.R.E.* 404 (b) & 608

D was charged with murder by abuse or neglect for the death of his 2-year-old nephew, (V). D was alone with V for 2 days. When V's mom returned, she saw bruises on V's face which D said were from skateboarding. Two days later, V started vomiting and after being taken to the hospital, he died. The M.E. testified the cause of death was blunt force trauma to the abdomen that occurred about 48 hours before death.

About 2 months before V's death, V's mom was seen by 2 State employees striking V more than ten times. Prior to trial, the State filed a motion to exclude evidence of this incident. The court barred independent testimony of the prior incident and indirectly barred D from cross-examining V's mom about the incident. The court reached this decision after conducting a *Getz* analysis and concluding that the prior incident was too remote, was not alleged to be the cause of death, could confuse the jury and could lead to tangential proceedings.

On appeal, D argued the trial court's decision reflected a misapplication of the rules of evidence and violated his right to confrontation and cross-examination. The trial court's decision was affirmed as the jury did hear some evidence from 2 witnesses that V's mom had struck V. Further, the jury acquitted D on the murder charge and convicted him of the LIO of assault second. More extensive cross-examination may have cast more doubt on the mom's credibility, but the facts supported a conviction for assault. Thus, D's convictions were affirmed.

CABRERA V. STATE, (July 8, 2008): TRANSFERRED INTENT/ CROSS-EXAMINATION

V, a 15-year-old girl, spent the night at the home of her best friend, D's daughter, along with another girl. While she was sleeping in a room by herself, a man came in and rubbed her pubic area. He then came back in later, locked the door, got in bed with her, rubbed her pubic area, kissed her, attempted to take off her shirt and felt her breasts. V got up, ran out the door and stayed in the bathroom. She then woke up her friend. They left and went to their basketball coach's house and they called the police. D was indicted on unlawful sexual contact based on his alleged conduct and the fact that V was under 16

years of age. At trial, D claimed he went in the room but thought it was his daughter and he only kissed her on the forehead. At trial, the judge denied D's request to question V on the effects of her use of anti-depressant medication on her memory. During deliberations, the jury asked whether the charge had been proved if the D committed the act but had the identity wrong. The court issued a transferred-intent instruction.

On appeal, the Court ruled that the trial court properly gave a transferred intent instruction because the jury could have believed D's testimony that he thought he was going in his daughter's room and believed V's testimony as to what occurred. The trial court did not err when it denied cross-examination of V on her use of medication. D presented no expert to testify as to what side effects could result from use of that medication. Thus, it would be improper to present V's testimony that her memory was not affected and allow D to argue that it did. D's convictions were affirmed.

GATTIS V. STATE (July 24, 2008): MOTION TO DISQUALIFY/RULE 61/APPLICABLE STANDARD FOR WEIGHING MITIGATION/JUDGE'S EXTRAJUDICIAL CONTACT WITH JURORS/APPROPRIATE WEIGHT FOR JURY'S DEATH RECOMMENDATION

As the result of the shooting death of D's girlfriend, D was convicted of Murder 1st, Burglary 1st, PDWBPP, and PDWDCF (2 counts). His conviction was affirmed on appeal and he had been denied post-conviction relief in State and Federal court. He filed a second motion for post-conviction relief. This appeal resulted from the trial court's denial of that motion.

D argued the trial judge erred in failing to disqualify herself when she had clearly shown animosity toward D's counsel in a written decision in a previous case. *See Jones v. State*. The Court found that the judge failed to perform the correct analysis under *Los v. Los* in denying D's motion for refusal. Thus, the matter was remanded for the analysis to be performed. After reviewing the subsequent analysis, the Court ruled that: the Judge showed she harbored no bias against D (subjective) and a reasonable objective observer would not believe the Judge harbored bias against D (objective). The judge's past animosity toward counsel was "objectively insufficient to cause doubt as to the trial judge's impartiality."

D also raised an ineffective assistance of counsel claim with respect to his trial counsel. The Court concluded the trial judge was correct in finding D procedurally barred from raising this issue as both it and federal courts had previously addressed the issue. D also argued that Delaware's death sentence scheme was unconstitutional as it

requires that the jury find all aggravating circumstances outweigh the mitigating circumstances by only a preponderance of the evidence. This Court ruled that *Ring v. Arizona* only requires that a statutory aggravating circumstance be proven beyond reasonable doubt. Thus, Delaware's death sentencing scheme is not unconstitutional.

Finally, that several jury members kept in touch with the presiding trial judge prior to D's sentencing did not warrant vacating D's death sentence. D failed to establish any prejudice. A 1992 *News Journal* article upon which D relied in asserting its argument was not "newly discovered evidence" as it was available prior to D's filing his first motion for post-conviction relief. And, there was no evidence presented in D's post-conviction motion to support the argument that the judge gave undue weight to the jury's 10-2 vote in favor of death even though the judge said he had been prepared to impose life before the jury returned its vote. The Court found that this was proper as the decision to impose life or death is a collaborative one made by both judge and jury.

WALLACE V. STATE (Aug. 1, 2008): 8TH AMENDMENT/JUVENILE SENTENCING/WAIVER OF STATE CONSTITUTIONAL CLAIMS
ALLACE V. STATE (Aug. 1, 2008): 8TH AMENDMENT/JUVENILE SENTENCING/WAIVER OF STATE CONSTITUTIONAL CLAIMS

After a bench trial, 15-year-old D was found guilty, but mentally ill of PDWDCF and murder 1st of his cousin. The trial court imposed a life sentence without the possibility of probation, parole or any other reduction. On appeal, D argued, under both the Delaware and U.S. Constitutions, that this sentence was "cruel and unusual" as it was disproportionate for a juvenile offender. In order to preserve a state constitutional claim, D is required to refer to some "textual language, legislative history, preexisting State law, structural differences, matters of particular state interest or local concern, state traditions and public attitudes." Here, however, D provided only a conclusory statement. Thus, his claim was waived.

The Court held that there was no 8th Amendment violation under the U.S. Constitution because the sentence was not disproportionate to the crime. Proportionality is determined by evolving standards of decency and the Delaware legislature has, for decades, allowed for non-parolable life sentences for juveniles tried as adults for intentional murder first. Referencing *Roper v. Simmons* the Court explained that while death is not a permissible sentence, life imprisonment is.

CULVER V. STATE (Aug. 5, 2008): ADMINISTRATIVE SEARCH
****REVERSED, VACATED, AND REMANDED****

Police received an anonymous tip that D was engaged in drug activity. The tip was based on information that could be observed from the street: a high volume of cars went to D's house and a description of D's car. Lt. Ogden (DSP) went to D's house, saw people quickly coming and going and saw D in the previously described car. One officer stayed at D's house while another followed then stopped D's car. All occupants and the car were searched with the help of a K-9. Nothing incriminating was found. D's P.O. was contacted and an administrative search of D's house was conducted. The purported reasons for the search were that: D had failed drug tests; D had missed one curfew by 20 minutes; and that DSP said D had contraband. The administrative search turned up a loaded .357 Magnum revolver. D was violated because he was prohibited from possessing a weapon. While at the VOP Center, and upon being served his arrest warrant, D made inculpatory statements. He filed an unsuccessful motion to suppress the weapon and his statements and was later convicted of PDWBPP.

On appeal, the Court held that "Parole and Probation Procedure 7.19 makes it plain that P.O.'s must rationally assess facts made known to them before reaching the critical conclusion that there is a reasonable basis to search the probationer's dwelling." Here, there was no sufficient basis for the information provided to the P.O. In fact, the follow-up car search contradicted that information. Because the P.O. failed to conduct his own independent and objective assessment of the information, the search and subsequent statement were illegally obtained.

Justice Ridgely, with Justice Holland joining, issued a lengthy dissent arguing the alleged probation violations were a sufficient basis for the search and the subsequent statement was voluntarily given.

ALLEN V. STATE (Aug. 7, 2008): JURY INSTRUCTIONS

D was charged with raping 4 women. D requested severance of all charges, but only the charges relating to 1 V were severed. In a joint trial relating to the other 3 V's, the judge instructed the jury to consider evidence as to each count separately. The judge also stated that if evidence of one incident proves a common scheme relevant to the other charges, that evidence may be considered. However, the judge refused to use D's proposed phrase: "you are instructed that you may not accumulate the evidence in this case." Later, the jury requested clarification as to how to consider each count separately

while also looking at a common scheme. The court provided further instruction. D was found guilty of 3 of 8 charges and sentenced to 3 terms of life imprisonment.

D appealed arguing the jury instruction was legally insufficient as given. In affirming, the Court explained that D is not entitled to an instruction worded in a particular way and that the given instruction was substantially similar to previously approved instructions.

REVEL V. STATE (Aug. 7, 2008): COMMENT ON D'S RIGHT TO REMAIN SILENT

D was convicted of robbery and related offenses stemming from 2 bank robberies and 1 attempted bank robbery. Two other suspects had been identified by witnesses then released before D was identified. Upon arrest during a traffic stop, D, who was unemployed, was found with $1,136 cash and clothes that matched those of the perpetrator. During cross-examination, a police officer testified he did not ask D for a writing sample because D "…declined to make a statement and asked for an attorney…" D moved for a mistrial because the officer commented on D's right to remain silent. The motion was denied and a curative instruction given.

On appeal, the Court applied the four *Pena* factors used to determine whether a mistrial should be granted based on an allegedly prejudicial witness remark and concluded there was no prejudice because: (1) the comment was isolated; (2) the comment was made in response to defense questioning; (3) this was not a close case; and (4) a sufficient curative instruction was given. Thus, D's convictions were affirmed.

HICKS V. STATE (Aug. 7, 2008): PLEAS INVOLVING VOP'S

At a Fastrack hearing, D was offered a plea that would have resolved one set of charges and the accompanying VOP. D rejected that plea. The case then when to "Track I" wherein a plea was offered to resolve 2 sets of pending charges (the ones addressed at the Fastrack and a subsequent set). D, with the help of a different attorney than was at the Fastrack, took that plea. At a later VOP hearing, where he was represented by yet another attorney, D told the court it was his understanding that the VOP was part of the plea. His original attorney showed up, but there was no clear understanding of the plea so the hearing was postponed. At the next hearing, and after further review of the record, D was found in violation and given an additional sentence. D then sought to withdraw his plea, arguing that because of his counsel's ineffective assistance, he was unaware that the plea agreement did not include the dismissal of the VOP charge. The trial court denied this request.

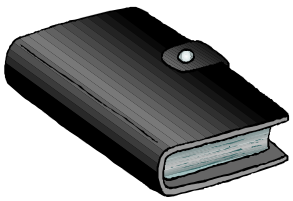
On appeal, the Court found no ineffective assistance of counsel and noted that it was clear that D had read and signed the TIS form which indicated that he knew the plea could amount to a violation. Further, while there was defective coordination between the various attorneys who had represented D along the way, there was nothing to indicate that any attorney led him to believe that the VOP was included in the plea that he ultimately took. Finally, the plea agreement itself did not refer to the VOP. Thus, the trial court's denial of D's request to withdraw his plea was affirmed.

HUDSON V. STATE (Aug. 15, 2008): EXPERT WITNESS/ *D.R.E.* 702

D was convicted of weapons and drug-related offenses. At trial, Det. Skinner served as both a fact and expert W. Skinner had never been an expert W before so the State was given an unrequested recess in order to inform W about how expert testimony differs from investigatory testimony as W. D appealed arguing W should not have been allowed to testify as both a fact and an expert W. D also argued even if the dual role was acceptable, this particular W was not qualified as an expert. Lastly, D argued the trial court erred in allowing the State to "educate" W about how to testify as an expert.

In affirming, the Court explained it is well-established Delaware law that a detective may testify as both a fact and an expert W. Additionally, W had sufficient training and experience to qualify as an expert. The Court also rejected D's argument that expert testimony was not necessary in this case. Once again, the Court explained it is well-established in Delaware that an expert is needed in cases involving PWITD. Lastly, the trial court's action in allowing the State to "educate" W as an expert was not error. The judge's intent was to avoid prejudicial statements which may have been made if W was not familiar with the distinction between investigatory and expert testimony.

WATERMAN V. STATE (Aug. 22, 2008): §3507/6th AMENDMENT RIGHT TO CONFRONTATION/ RULE OF COMPLETENESS



Child V alleged repeated sex abuse by D. V purportedly kept a journal where she described the incidents. By the time she was interviewed by CAC, however, only 4 torn-out pages remained. The trial court denied D's motion to exclude the pages finding that their introduction did not violate the "rule of completeness" and did not violate D's right to confrontation. Additionally, a recording of D's interrogation, where he adamantly maintained his innocence, was played for the jury. Throughout the interrogation, the officer repeatedly told D that V was telling the truth and that V was credible. Introduction of this unredacted tape violated the holding in *Hassan-El*. However, there

was no objection. Instead, the court, *sua sponte*, and over D's objection, decided a departure from *Flonnory* was warranted and sent the recording of V's CAC interview back with the jury during deliberation. The judge's rationale was that the jury needed to see V's statement tape again to compare it to the officer's representations. D was convicted of rape and related offenses.

On appeal, the Court affirmed the decision as to the introduction of the 4 torn-out journal pages. There was no need for exclusion simply because the rest of the journal was missing. D had an opportunity to cross-examine V and 2 other W's who had seen the entire journal. The Court did find error, however, in the judge's departure from the default rule in *Flonnory* that allows the introduction of a §3507 statement into evidence in only certain limited circumstances. It is unclear how this action would remedy the error committed by allowing D's unredacted statement to be presented to the jury. The proper action was to require the State to redact the interrogation before it was played for the jury. However, since it was not a close case, the error was harmless.

YOUNG V. STATE, (Aug. 22, 2008): SEVERANCE OF CHARGES/EVIDENCE OF INTENT

D arrived at his ex-girlfriend's apartment and encountered her new boyfriend (V) at the door. D and V struggled for 3-4 minutes when D "flipped a knife." V suffered lacerations to his face. Days later, after D and his "ex" had secretly become involved again, V encountered D in the hallway of the apartment building. During a fight, D stabbed V multiple times. D was charged with assault and weapons offenses from the first incident and with attempted murder and weapons offenses from the second incident. D moved to sever the 2 sets of charges. The trial court severed only the PDWBPP charges but denied the remainder of the motion. At trial, D moved, unsuccessfully, for a judgment of acquittal on the attempted murder charge arguing the State failed to establish D's intent to kill V.

On appeal, the Court found that the judge did not abuse his discretion when he denied the motion to sever as D failed to show a "reasonable probability that substantial prejudice may have resulted from a joint trial." Here, the incidents occurred within 20 days of each other, involved the same V, the same knife, infliction of similar injuries, same W's, same officers and arguably, the same motive. Even if they had been severed, the first incident would have been admissible in trial for the second as it went to motive, etc. Therefore, joinder was appropriate. Further, the State presented sufficient evidence that would allow the jury to find intent to kill: D was likely jealous of V's relationship with his girlfriend; D stabbed V 3 times in chest and abdomen; wounds required surgery; D fled leaving V bleeding in the street. Thus, the judge correctly denied D's motion for judgment of acquittal.

MONEY V. STATE, (Aug. 22, 2008): PROSECUTOR'S MISTATEMENT OF LAW/ LIO INSTRUCTIONS

D was charged with rape first degree and 3 counts of unlawful sexual contact first degree. There was no dispute that the State presented sufficient evidence to support LIO instructions of rape second and unlawful sexual contact second. Delaware requires an instruction that the jury can proceed to consideration of the LIO if it finds that the State failed to prove the greater beyond reasonable doubt or if it cannot make a unanimous finding on the greater offense. However, during closing, the prosecutor misstated the law and said that the jury can only proceed to the LIO if it finds him not guilty on the greater charge. The judge called the prosecutor to sidebar and told him this was incorrect. However, no curative instruction was made by the judge and the prosecutor never corrected himself in front of the jury. On appeal, the Court concluded, applying a plain error standard, that the jury was presumed to follow the correct statement of law that the judge gave during the general instructions. Thus, D's convictions were affirmed. However, the Court did admonish the prosecutor for not correcting himself.

CLARK V. STATE, (Aug. 26, 2008): ATTEMPTED RAPE/ JUVENILE SEX OFFENDER REGISTRATION

D, 13 years old, went to his friend's house. His friend was also 13 years old and had an older sister, V, who was also home. V, assuming D wanted to hang out with her brother, let D in the house. D tried to kiss her but she rebuffed his advances. V then led D back to her parent's room and told him that her brother was in there. She then went in her own bedroom. D came in her room and said he "wanted it and needed it." He then pushed her, set her against the bed and tried to go up her shirt and unbutton her pants. V told him to stop over and over again. He never got underneath her bra or pants and he did not touch her vagina. After 10 to 15 minutes, V pushed him off of her, dragged him to the kitchen and pushed him out the door. The next day, V went to the school nurse who reported the incident. She was then interviewed by police then CAC. At trial, D unsuccessfully argued that the State failed to present sufficient evidence that he was delinquent as to the attempted rape. D was subsequently found delinquent on attempted rape and unlawful sexual contact and ordered to register as a Tier III sex offender.

On appeal, D argued that the State only established that D attempted to engage in consensual sex with V. The Court concluded that although V did not scream or yell during the incident, D did not threaten, hit, punch or injure her and D did not tear or remove her clothes, the State established its case based on V's testimony. D entered uninvited, pushed her, set her against the bed and got on top of her. V also repeatedly refused to consent to engage in sex. Thus, the judge did not err in denying the motion.

Also, requiring D to register as a sex offender is not inconsistent with the fact that juvenile proceedings are designed, in part, to protect the best interest of a juvenile offender. To the extent there is any inconsistency, the Legislature, by enacting the sex

offender registration and notification statute, chose as a policy matter to protect society over the juvenile's interest in privacy. Thus, his registration requirement was affirmed.

HARRIS V. STATE (Aug. 28, 2008): RIGHT TO SPEEDY SENTENCING
****REVERSED & REMANDED****

D pled guilty in 2001 to unlawful sexual contact first degree. He then sought to withdraw his guilty plea, so a continuance was ordered. However, nothing further happened in his case until 2007 when he was finally rescheduled for sentencing. In that time frame, D was under presentence supervision. D filed a motion to dismiss on the grounds of a lack of speedy sentencing. This motion was denied.

In reversing, the Court stated the right to a speedy trial includes the right to speedy sentencing. It then applied the four *Barker* factors to determine whether D's right to a speedy sentencing was violated and concluded that: (1) the 6 ½ year delay weighed in D's favor; (2) while D was responsible for a short delay due to his request to withdraw his plea, there was no reason for the 6 ½ year delay; (3) weighing against D was the fact that he never asserted his right; and (4) any prejudice to D was considered neutral as he was not incarcerated during that time but was under presentence supervision. Thus, the Court reversed the trial court's decision after concluding that the 6 ½ year sentencing delay violated D's right to a speedy sentencing under the 6th Amendment.

LOPEZ-VAZQUEZ V. STATE (Aug. 29, 2008): 4th AMENDMENT/SEARCH & SEIZURE/CONSENT/EXCLUSIONARY RULE
****REVERSED & REMANDED****

S1 was the subject of a drug investigation which included police surveillance and 2 controlled drug buys. One day, an officer maintained observation of the Lancaster Court Apartments after S1 departed from there to engage in the second drug buy. During that time, the officer observed D, an individual whom police had no information, talking to S2, known by police as the subject of a different drug investigation, in front of the building where S1's apartment was located. S2 had arrived independently of D and the conversation lasted about 15 minutes. When S1 returned, he threw his keys to S2 then walked away. S1 did not acknowledge D in any way. S2 and D then went inside the building. Police could not see where the individuals went once they were in the building. Meanwhile, a warrant to search S1's apartment was obtained. After it was executed an hour later, D was seen walking out the building. Police stopped D and D consented to a search of both his person and his car. Drugs were found in D's car. The trial court denied a motion to suppress and D was convicted of drug charges.

On appeal, the State conceded that police performed a *Terry*-stop when they questioned D. The Court reversed D's convictions after concluding police did not have reasonable articulable suspicion to stop D because D was not known to police nor was D the subject of any investigation. D merely conversed with the subject of an investigation outside D's apartment complex. The trial court erred in finding that D made a contact with S1 and that D met with S1 in S1's apartment. Because the searches were illegal, the drugs found in D's car should have been suppressed.

DAILEY V. STATE (Sept. 2, 2008): §3507/§3513/ RIGHT TO TESTIFY/IMPROPER PROSECUTORIAL COMMENTS

D was convicted of 3 counts of rape first of a 6-year-old girl. V gave a videotaped statement to CAC which was introduced at trial after V testified that D tried to touch her "butt" with his "wee wee." Additionally, upon request for clarification by D's counsel, the trial court explained that, if D testified, it was likely that evidence of his prior conviction of unlawful sexual contact would be admitted. D then chose not to testify. Finally, D put on evidence that V had made an earlier claim of sexual contact. During closing, D argued the State never investigated this claim. Thus, in rebuttal, the State began to say that D did not put on such evidence. The prosecutor stopped once D objected on the grounds that the State sought to shift the burden to D.

On appeal, D argued the State failed to lay a proper foundation for the admission of V's out-of-court CAC statement under §3507. The Court noted that it is actually §3513 that applied in this case because V was younger than 11. Under that section, V is required to be present, give testimony that "touches upon the event," and be subject to cross-examination. There is no requirement in §3513, as there is in §3507, that W's testimony touch on the out of court statement itself. The Court noted concern as to whether this language was intentionally different. It is not clear as to its meaning as §3507 is incorporated into §3513. The Court avoided this issue when it stated that the jury saw that V spoke about the same event during her interview as she did at trial.

The Court also ruled that D's claim that the judge chilled his exercise of his right to testify when it gave an erroneous advisory opinion as to the admissibility of his prior conviction was not preserved. It would have been preserved had D testified and the judge erroneously allowed in such evidence. Finally, the State's comments during closing did not shift the burden of proof to D. It simply argued a reasonable inference to be made from the evidence.

WOOD V. STATE (Sept. 10, 2008): SEVERANCE OF CHARGES

D was charged with 2 series of sexual abuse involving 2 different female children. Between 1994 and 2001, D forced V1, who lived in the same apartment complex as he did, to have oral sex more than 50 times. Between 2000-2005, D had oral, vaginal, and anal contact with V2, the daughter of his live-in girlfriend. This supposedly occurred between 500-2,000 times. D also videotaped and blindfolded V2 and integrated a crack smoking ritual into the abuse. D moved for the 2 sets of charges to be severed because

the acts occurred at different times, V's had different relationships with D, and D's defenses for each charge would be different. The State noted that each set of charges was relevant to the other to establish *modus operandi*. The motion was denied because the crimes were similar. D was subsequently convicted of 18 counts of rape first and 2 counts of continuous sexual abuse of a child.

On appeal, D argued that: he would have testified as to one set of charges if there were separate trials; the cases were different and the jury would not be able to assess the evidence separately; and joinder allowed the jury to believe D has a criminal propensity. In affirming, the Court found that the offenses were properly joined because they arose from sufficiently similar incidents. The two sets of charges show a common scheme or plan: deception, blindfolding and subjection to pornography. Thus, the burden was on D to show prejudice. D was unable to meet this high burden: D's opportunity to present a proper defense was not infringed because he offered identical defenses to each set of charges: "he did not do it;" the jury was instructed to consider each offense separately; the jury sent out notes indicating its careful consideration of each charge; and D was not convicted on all charges which showed the jury evaluated each charge separately.

TURNER V. STATE (Sept. 10, 2008): 5th AMENDMENT/6th AMENDMENT RIGHT TO COUNSEL/ HABITUAL OFFENDER SENTENCING

D and his girlfriend, Crump, went to V's apartment as D claimed V owed D money. D shot V in the stomach then took off with Crump. They were arrested the next day. D was interviewed and denied involvement in the shooting. In the meantime, police did not believe Crump was involved and decided not to charge her with anything. Later, D said that if Crump was released, he would tell police everything. Crump was released after she received unsecured bail on other unrelated charges. Police read D his *Miranda* rights and D admitted to going to V's apartment and shooting in an effort to scare V. He did not mean to shoot V. D was subsequently charged with attempted murder and other felonies. D was acquitted of the attempted murder but was found guilty of nine other felonies. Upon sentencing as an habitual offender on two of the felonies, D received two life terms plus 87 years at Level V.

D filed a motion to suppress based on a 5th Amendment involuntariness argument. He claimed his statements should be suppressed because police coerced him into making those statements by threatening to charge Crump. At the suppression hearing, even though he did not raise it in his brief, D raised a 6th Amendment right to counsel issue. This motion was denied. In affirming this decision, the Court found that D was not coerced because: he was read his *Miranda* rights; he had ample experience in the criminal justice system; the interrogations were not lengthy; and he was given breaks.

Additionally, D waived any issue with respect to a violation of his 6th Amendment right to counsel because he did not brief it and only raised it orally the day before trial. The Court concluded that since the 6th Amendment issue was likely to be unsuccessful, there was no plain error.

Finally, the Court concluded, under a plain error standard, D's sentence was not inappropriate. The State requested a total of 145 years under § 4214 while D had asked that his sentence be imposed on only one violent felony as he was acquitted of the lead charge. The Court upheld the sentence explaining that, because D was a habitual offender, the judge was permitted to impose 9 life sentences. Thus, sentencing D to two life sentences plus 87 years at Level V was acceptable.

COLES V. STATE (Sept. 15, 2008): MATERIAL WITNESS / LIO INSTRUCTION

After having an altercation with V over drugs, D walked back to his car then heard a gun shot. D shot back four times. Two bullets fatally struck V. W gave a statement to police about shootings in the neighborhood generally and this case specifically. D was charged with murder first and two weapons offenses. The State indicated it would not call W to testify at trial as it was unable to locate her. Thus, D subpoenaed W. After she failed to show, D asked the judge to issue a material witness warrant. This request was denied. The court also denied D's alternative request to admit W's interview into evidence. At the State's request, the court instructed the jury as to the LIO's of murder second and manslaughter. D was later convicted of murder second and the two weapons offenses.

On appeal, D argued the judge abused his discretion by not issuing a bench warrant for W, excluding W's videotaped statement, and instructing the jury about the LIO's of murder second and manslaughter. The Court found that D failed to show that W would provide testimony that is both material and favorable. This is required in order to establish a violation of D's 6th Amendment right to compulsory process. Contrary to D's assertion, W never made any statements that supported D's self-defense claim or that provided an explanation as to why no weapons were found on V. Additionally, W did not actually see the shooting so her statement was not admissible under *D.R.E.* 807, the residual exception hearsay rule, as it was not relevant to a material fact. Finally, the trial court properly instructed the jury on the LIO's of murder second and manslaughter as there was sufficient evidence in the record that D "recklessly" caused V's death.

SWANSON V. STATE (Sept. 16, 2008): MISTRIAL/ DOUBLE JEOPARDY **REVERSED & REMANDED**

Police found 2 loaded shotguns, ammunition, drugs, and paraphernalia at the house of D's girlfriend, W. W lived there with her 2 kids. D originally admitted the guns were his after police told him that W could lose her kids and her home. D was then charged with 2 counts of PDWBPP and other drug and weapons charges. W was on the State's witness list. However, she testified on D's behalf that she owned the guns for self-defense purposes. During her testimony, the judge stopped the trial and addressed the concern that W could be incriminating herself. D told the judge that W was aware of her rights because she had met with four attorneys to discuss this situation. However, the judge insisted that W meet with another lawyer. After meeting with W, the other lawyer told the judge that he advised W to invoke her Fifth Amendment right against self incrimination. The State moved for a mistrial because it would be unable to cross-examine W. Over D's objection, the judge granted the request.

On appeal, D argued a mistrial should not have been granted because it was not based on manifest necessity. The Court agreed holding that a finding of manifest necessity requires the judge to "scrupulously consider all available alternatives" prior to ordering a mistrial. Here, there was no manifest necessity. W had already testified about owning the guns and, because she was not prohibited from owning guns, she would not incriminate herself in this regard. Additionally, there was no concern that she might incriminate herself with respect to a charge of endangering the welfare of a child because she could invoke her right as to individual questions in that regard. There were other alternatives which the trial court failed to consider: limiting the scope of cross-examination; instructing the jury to disregard W's testimony; asking the State to grant W immunity; or asking the parties for possible solutions. Thus, D's right against double jeopardy was violated when he was retried.